No. 17-8151

IN THE

Supreme Court of the United States

RUSSELL BUCKLEW,

Petitioner,

v.

ANNE L. PRECYTHE, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF ARIZONA VOICE FOR CRIME VICTIMS, INC., AND MELISSA SANDERS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

PAUL G. CASSELL
S. J. QUINNEY COLLEGE OF LAW
AT THE UNIVERSITY OF UTAH
383 South University Street
Salt Lake City, Utah 84112

DANIEL NOWICKI
GIBSON, DUNN &
CRUTCHER LLP
333 South Grand Avenue
Los Angeles, California 90071

ALLYSON N. HO
Counsel of Record
GIBSON, DUNN & CRUTCHER LLP
2100 McKinney Avenue
Dallas, Texas 75201
(214) 698-3233
AHO@GIBSONDUNN.COM

DANIEL CHEN
GIBSON, DUNN & CRUTCHER LLP
555 Mission Street, Suite 3000
San Francisco, California 94105

Counsel for Amici Curiae

QUESTION PRESENTED

Whether Russell Bucklew's dilatory strategy of refusing to bring an as-applied challenge—which he was aware of for at least six years—until twelve days before his execution bars him from invoking equitable relief under 42 U.S.C. § 1983, especially considering the strong interest of his victims and their families in obtaining closure and an end to re-victimization through perpetual litigation.

TABLE OF CONTENTS

Page

INTEREST OF AMICI CURIAE 1

STATEMENT 2

ARGUMENT 11

I. Decades-Long Delays In Obtaining Justice Inflict Immeasurable Harm On Victims' Families. 11

A. The Family Members Of Bucklew's Victims Continue To Be Victimized By His Dilatory And Manipulative Litigation Tactics 12

B. Research Confirms What The Experience of Victims Makes Plain—Undue Delays in the Administration of Justice Harm Victims of Violent Crimes. 13

II. Bucklew's Manipulative And Dilatory Suit—Based On A Claim He Refused To Bring For Years—Exemplifies The Toll Exacted On Victims Of Violent Crime As They Wait For Justice And Closure. 16

CONCLUSION 19

TABLE OF AUTHORITIES

Page(s)

Cases

Bucklew v. *Lombardi*,
783 F.3d 1120 (8th Cir. 2015) 9, 10

Bucklew v. *Luebbers*,
436 F.3d 1010 (8th Cir. 2006) 2, 3, 4, 6, 7

Bucklew v. *Precythe*,
883 F.3d 1087 (8th Cir. 2018) 10, 11, 12

Bucklew v. *State*,
38 S.W.3d 395 (Mo. banc 2001) 5, 7

Clemons v. *Crawford*,
585 F.3d 1119 (8th Cir. 2009) 8

Gomez v. *U.S. Dist. Court for N. Dist. of California*,
503 U.S. 653 (1992) 17

Hill v. *McDonough*,
547 U.S. 573 (2006) 17, 18, 19

In re Lombardi,
741 F.3d 888 (8th Cir. 2014) 9

Ringo v. *Lombardi*,
677 F.3d 793 (8th Cir. 2012) 8, 9

State v. *Bucklew*,
973 S.W.2d 83 (Mo. 1998) 3, 4, 5, 6, 7

TABLE OF AUTHORITIES *(continued)*

Page(s)

White v. *Johnson*,
429 F.3d 572 (5th Cir. 2005) 18

Statutes

42 U.S.C. § 1983 ..... 7, 18, 19

Other Authorities

Dan S. Levey, *Balancing the Scales of Justice*, 89 Judicature 289 (2006) 15, 16, 17

Dean G. Kilpatrick & Ron Acierno, *Mental Health Needs of Crime Victims: Epidemiology and Outcomes*, 16 J. Traum. Stress 119 (2003) 14

Jim Parsons & Tiffany Bergin, *The Impact of Criminal Justice Involvement on Victims' Mental Health* J. Traum. Stress 182 (2010) 14, 15, 16

Judith Lewis Herman, *The Mental Health of Crime Victims: Impact of Legal Intervention*, 16 J. Traum. Stress 159 (2003) 15, 16

Mary Beth Ricke, *Victims' Right to a Speedy Trial: Shortcomings, Improvements, and Alternatives to Legislative Protection*, 41 Wash. U. J. L. & Pol'y 181 (2013) 15, 16

TABLE OF AUTHORITIES *(continued)*

Page(s)

Samuel R. Gross & Daniel J. Matheson, ***What They Say at the End: Capital Victims' Families and the Press***, 88 Cornell L. Rev. 486 (2003) 15, 16

Scott Moyers, ***Penalty of Death, Part 1***, SOUTHEAST MISSOURIAN (March 20, 2011), available at https://tinyurl.com/yav2c22g 2, 4, 5, 12, 13

Scott Moyers, ***Penalty of Death, Part 2***, SOUTHEAST MISSOURIAN (March 21, 2011), available at https://tinyurl.com/y7ovn2wk 2, 3, 4, 5

Scott Moyers, ***Penalty of Death, Part 3***, SOUTHEAST MISSOURIAN (March 22, 2011), ***available at*** https://tinyurl.com/ybsz7t3b 6

Scott Moyers, ***Penalty of Death, Part 4***, Southeast Missourian (March 23, 2011), ***available at*** https://tinyurl.com/y7asb8bw 13

Ulrich Orth & Andreas Maercker, ***Do Trials of Perpetrators Retraumatize Victims?***, 19 J. Interpersonal Violence 212 (2004) 15

TABLE OF AUTHORITIES *(continued)*

Page(s)

Court Filings

Clemons v. *Crawford*,
2:07-CV-04129 (W.D. Mo.), Dkt. 78 8

In re Lombardi,
2:12-cv-04209 (W.D. Mo.), Dkt. 1-2 9

In re Lombardi,
2:12-cv-04209 (W.D. Mo.), Dkt. 183 9

In re Lombardi,
2:12-cv-04209 (W.D. Mo.), Dkt. 443 9

Ringo v. *Lombardi*,
2:09-CV-04095 (W.D. Mo.), Dkt. 6 8

INTEREST OF AMICI CURIAE*

Arizona Voice for Crime Victims, Inc. (AVCV) is an Arizona nonprofit corporation that works to promote and protect crime victims' interests throughout the criminal justice process. To achieve these goals, AVCV empowers victims of crime through legal advocacy and social services. AVCV also provides continuing legal education to the judiciary, lawyers, and law enforcement.

A key part of AVCV's mission is giving the judiciary information and policy insights that may be helpful in the difficult task of balancing an accused's constitutional rights with crime victims' rights, while also protecting the wider community's need for deterrence.

Melissa Sanders is the sister of Michael Sanders, who was murdered by Russell Bucklew in 1996. After Michael's murder, Melissa and her husband took care of Michael's two young sons, John Michael and Zach, and she has served as the principal contact for the Sanders family regarding the prosecution of Russell Bucklew. She has an interest in seeing justice carried out for her brother Michael and in attaining closure for his other family members.

---

* Pursuant to Supreme Court Rule 37.6, *amici* represents that this brief was not authored in whole or in part by any party or counsel for any party. No person or party other than *amici*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. All parties have filed blanket consents to the filing of *amicus curiae* briefs in accord with Supreme Court Rule 37.3.

STATEMENT

In 1996, Russell Bucklew brutally murdered Michael Sanders as his two young sons—only four and six years old—watched their father bleed to death in front of them. Then, as the young daughters of Bucklew's other victim, Stephanie Ray, cried and wailed for their mother, Bucklew handcuffed and dragged her away to endure hours of rape and torture. Bucklew's reign of terror continued when he broke out of jail, forced victims to go into hiding, and ambushed one victim's mother in her own home. He was tried, convicted, and sentenced to death over 20 years ago.

Bucklew's violent crimes exacted ân unspeakably cruel toll on his victims and their families. But that was just the beginning of their suffering. Bucklew has pursued a manipulative, dilatory litigation strategy that has robbed his surviving victims of even the smallest measure of closure and peace.

1. Stephanie Ray first met Russell Bucklew in mid-1995. Scott Moyers, *Penalty of Death, Part 2*, SOUTHEAST MISSOURIAN (March 21, 2011), available at https://tinyurl.com/y7ovn2wk; see also *Bucklew* v. *Luebbers*, 436 F.3d 1010, 1013 (8th Cir. 2006). At twenty-one years old, she was looking for someone who could help her look after her two young girls, and at first, she thought she might have found that someone in Bucklew. Moyers, *Penalty of Death, Part 2*; see also Scott Moyers, *Penalty of Death, Part 1*, SOUTHEAST MISSOURIAN (March 20, 2011), available at https://tinyurl.com/yav2c22g (Ray was "all of 21" in March of 1996). He helped her change the girls' diapers, got them toys, and looked after them while she was working at her job at a pottery company. Moyers, *Penalty of Death, Part 2*.

After a few months, he moved in with her and her daughters in a trailer in southeastern Missouri. She had to provide for him—he used the benign tumors in his mouth as an excuse not to work—but their relationship nevertheless seemed to be making progress. *Ibid.* She was apparently unaware of his "extensive criminal history, including prior convictions for trespass, assault, burglary, stealing, driving while intoxicated, possession of marijuana, grand theft, [and] assaulting past girlfriends." 436 F.3d at 1014.

But Bucklew could not maintain the façade forever, and by February 1996, Stephanie was ready to move on. They often fought, his refusal to work was wearing on her, and, on top of it all, she was devastated by the loss of her baby early that year. By Valentine's Day, she told him they were done, and kicked him out of her trailer. Moyers, *Penalty of Death, Part 2*; *State* v. *Bucklew*, 973 S.W.2d 83, 86 (Mo. 1998).

2. Bucklew, however, was far from done. A few weeks later, he walked into Stephanie's trailer unannounced. She was not there, but Michael Sanders, her co-worker and friend, was. Bucklew grabbed a kitchen knife, put it to Michael's throat, and said, "get the hell out of my house or I'm going to kill you." Moyers, *Penalty of Death, Part 2*; 973 S.W.2d at 86. Bucklew let Michael leave when he explained he was just friends with Stephanie and there to pick up his guitar—he had been teaching her how to play.

Bucklew returned to the trailer that evening and waited for Stephanie. When she returned from work, he burst out from behind the door, pulled her to the ground, dragged her to the back bedroom, pinned her to the bed, and put a knife to her throat. *Ibid.* He cut

her jaw, punched her in the face—and then, miraculously, left. 436 F.3d at 1013.

3. But Bucklew's campaign of terror was just beginning. The next day, he called Stephanie at work and vowed to kill her and her children: "If I ever see you around that guy again, I will kill you and the kids. I will cut them up in front of you." Moyers, *Penalty of Death, Part 2*; 973 S.W.2d at 92-93. Stephanie was terrified, but determined to protect her daughters. She called the police, and got an order of protection requiring Bucklew to stay away from them. Moyers, *Penalty of Death, Part 2*; 973 S.W.2d at 86. But she knew that was not enough—he was sure to come to their trailer, order or no. That night, she took her children to her mother's. Moyers, *Penalty of Death, Part 2*. The next day, Stephanie and her daughters moved in with Michael and his two young sons. 436 F.3d at 1013.

4. But there would be no peace for Stephanie, Michael, or their children. On the night of March 20, 1996, "Bucklew stole his nephew's car and left with two pistols, two sets of handcuffs, and a roll of duct tape." *Ibid*. He stalked Stephanie throughout the day—watching her as she left work, ran errands, and eventually returned to Michael's trailer. *Ibid*. Inside the trailer were Stephanie's daughters and Michael's sons: John Michael Sanders (age six) and his brother Zach (age four). The two boys played in the living room as their father and Stephanie spoke in the bedroom. Moyers, *Penalty of Death, Part 1*.

After briefly waiting outside, Bucklew approached Michael's trailer and knocked on the front door. Hearing the knock, six-year-old John Michael unlocked the door. *Ibid*. Bucklew burst into the house "with a pistol in each hand" but before he could hurt

the children, Michael appeared and shoved them down the hall. 973 S.W.2d at 86; Moyers, *Penalty of Death, Part 1*. But that was all he could do. Bucklew "yelled 'get down' and without further warning began shooting at [Michael]." 973 S.W.2d at 86.

Slumped against the wall, his lung shredded by a bullet, Michael tried to pacify his killer, pleading, "I'm cool, man. I'm down." *Ibid.*; Moyers, *Penalty of Death, Part 1*. Unsatisfied, Bucklew "aimed the gun at [Michael's] head"—but was distracted by another target. 973 S.W.2d at 86. "[W]hen he saw [Michael's] six-year-old son," Bucklew "fired at the boy instead." *Ibid.* Bucklew later bragged that he thought he'd killed the first-grader, Moyers, *Penalty of Death, Part 2*—but fortunately, the shot missed. 973 S.W.2d at 86.

As Michael lay dying, Stephanie stepped forward to protect him, standing between him and his killer. *Ibid.* Bucklew demanded that she drop to her knees—and when she refused, he "pistol-whipped [Stephanie], breaking her jaw, and knocking her to the kitchen floor in a semi-coherent condition." *Id.* at 91. He handcuffed Stephanie, dragged her into the stolen car, and kidnapped her "from [Michael's] trailer as her children cried." *Ibid.*

Over the next five hours, Bucklew brutally raped Stephanie multiple times. Later, "when she did not perform every act [Bucklew] demanded," *Bucklew* v. *State*, 38 S.W.3d 395, 397 (Mo. banc 2001), he "took her to a secluded spot and put a gun to her head and raped her while her hands were taped in front of her body," 973 S.W.2d at 91. After subjecting Stephanie to hours of torture, Bucklew was finally apprehended when the highway patrol cornered him—but even then they first had to defeat him in a gun battle. 38

S.W.3d at 397. Bucklew told Stephanie that he "would take as many police officers with him as he could in a shootout," 973 S.W.2d at 93—and although no officers were killed, one was wounded—and before Bucklew was arrested, he fired a round into Stephanie's leg. Scott Moyers, *Penalty of Death, Part 3*, SOUTHEAST MISSOURIAN (March 22, 2011), *available at* https://tinyurl.com/ybsz7t3b.

By the time Bucklew was apprehended, Michael had bled to death. 973 S.W.2d at 87; 436 F.3d at 1014.

5. Even after all this, Bucklew was not done tormenting his victims. While awaiting trial for murder, Bucklew claimed his condition interfered with his eating, allowing him to excuse his otherwise-alarming 15-pound weight loss—which helped him fit into a trash bag that an accomplice tossed into an outgoing bin. Moyers, *Penalty of Death, Part 3*. As soon as Bucklew's escape was discovered, Stephanie and her daughters were placed in protective custody, and her mother, Barbara, stayed at a hotel with her boyfriend Ed Frenzel. *Ibid.*

After two days at the hotel, Barbara and Ed returned home—with a police escort—to collect a few belongings. *Ibid.* After their escort swept the home and gave the all clear, they spent an hour or so tidying up, until Barbara went to check the lock on the back door. As she turned to walk back to the living room, Bucklew burst out of a closet and ambushed her. 436 F.3d at 1014; Moyers, *Penalty of Death, Part 3*. Screaming "[y]ou're going to die," Bucklew attacked the couple with a knife and hammer, but they managed to escape their home with their lives. Moyers, *Penalty of Death, Part 3*.

6. Bucklew was eventually recaptured and convicted in state court of murder, kidnapping, and

rape. He was sentenced to death, and the Missouri Supreme Court affirmed his sentence on direct appeal. 973 S.W.2d 83. Bucklew's state and federal habeas petitions were denied as well. See 38 S.W.3d 395; 436 F.3d 1010.

7. With normal avenues of review exhausted, Bucklew adopted a new strategy to avoid the execution of his sentence—bring a facial challenge to Missouri's lethal injection protocol under 42 U.S.C. § 1983, but keep an as-applied challenge (based on his benign oral tumors) in reserve, ready to use when most strategically advantageous.

Having exploited his condition to escape from jail over a decade before, Bucklew was well aware of his symptoms—and that they might provide some basis for an as-applied challenge. In June 2008, Bucklew filed a pleading asking for $7,200 to hire a medical expert to support a clemency application—and supported his request by claiming that, because of his condition, "execution by lethal injection may pose a substantial and intolerable risk of inflicting serious harm and excruciating pain." Resp. App. at 798a. His 2008 filing included extensive argument that "Bucklew will suffer the risk of serious harm amounting to cruel and unusual punishment during the administration of Missouri's lethal injection protocol in light of his affliction with cavernous hemangioma." *Id.* at 796a. It even stated that Bucklew sought to demonstrate that Missouri's procedure was unconstitutional "*as applied uniquely to Mr. Bucklew.*" *Id.* at 797a (emphasis in original).

Yet despite his obvious awareness of a possible as-applied challenge based on his condition, Bucklew refused for years to bring such a challenge. Instead, he brought or joined a series of facial challenges—

always ensuring that his as-applied challenge was at the ready for later use.

Bucklew first attempted to intervene in a pending facial challenge to Missouri's injection procedure in July 2008, when he moved to intervene in *Clemons* v. *Crawford*, 2:07-CV-04129 (W.D. Mo.). Just two weeks earlier, the Missouri Supreme Court denied his motion to reconsider its previous order granting the State's motion to set execution dates "in due course." Dkt. 78 at 3, *Clemons* v. *Crawford*, 2:07-CV-04129 (W.D. Mo.). To postpone execution, Bucklew moved to intervene in the federal case—arguing, repeatedly, that he was identically situated to the other plaintiffs (none of whom had his condition). See *id.* at 8, ("Timeliness is no objection to the intervention of a person who fits the model of the other plaintiffs to the extent that [Bucklew] does"); *ibid.* ("the risks of severe pain that [Bucklew] faces are the same as those that plaintiffs face"); *id.* at 9 ("By virtue of their common stake in a positive outcome, Mr. Bucklew's interests are bound up with those of the four [plaintiffs]"); *ibid.* (claiming Bucklew would "adopt by reference" any pleadings filed by the other plaintiffs).

After Bucklew's attempt at intervention was denied, *Clemons* v. *Crawford*, 585 F.3d 1119, 1129 (8th Cir. 2009), he joined a different challenge claiming Missouri's protocol was preempted by the Federal Controlled Substances Act and the Federal Food, Drug & Cosmetic Act. Dkt. 6, *Ringo* v. *Lombardi*, 2:09-CV-04095 (W.D. Mo.). That action was dismissed as moot when Missouri was no longer able to procure the drugs necessary to implement its protocol—and, up through the end of the case, Bucklew gave no indication that his position varied

from any other plaintiff on death row. See *Ringo* v. *Lombardi*, 677 F.3d 793, 797 (8th Cir. 2012).

A few months after that action was dismissed, Bucklew joined another group of death-row plaintiffs in a facial Eighth Amendment challenge to the new drug protocol—arguing that Missouri's 2012 protocol posed "an objectively intolerable risk of severe pain" for *any* capital defendant. Dkt. 1-2 at 13, *In re Lombardi*, 2:12-cv-04209 (W.D. Mo.). After Missouri implemented the current pentobarbital protocol in October 2013, Bucklew joined an amended complaint challenging that protocol—again on facial grounds, and without any suggestion that it might be uniquely unconstitutional as applied to him. Dkt. 183, *In re Lombardi*, 2:12-cv-04209 (W.D. Mo.).

The district court in that case issued a discovery order requiring that the identities of the physician, pharmacist, and laboratory involved in prescribing and procuring the pentobarbital be disclosed—and the Eighth Circuit vacated the order, effectively holding that the facial challenge was meritless given the failure to identify an alternative means of execution. *In re Lombardi*, 741 F.3d 888, 895 (8th Cir. 2014). On remand, Bucklew—along with the other plaintiffs—refused to plead a feasible alternative, and their Eighth Amendment claims were dismissed. Dkt. 443, *In re Lombardi*, 2:12-cv-04209 (W.D. Mo.).

8. On May 9, 2014, less than two weeks before his scheduled execution, Bucklew *finally* brought his as-applied challenge. App. at 1; *Bucklew* v. *Lombardi*, 783 F.3d 1120, 1122 (8th Cir. 2015). Having held that challenge in reserve for years, Bucklew was able to secure a stay of execution from this Court while Missouri's other capital defendants could not, see 783 F.3d at 1123–24, and he staved off dismissal of his

new as-applied claims despite the dismissal of the other defendants' facial challenges. *Id.* at 1129.

Even while litigating this "new" claim, Bucklew was careful to preserve as many opportunities for future litigation as possible. Required to plead an "alternative" execution method, Bucklew vaguely argued that "lethal gas" could be a comparatively less painful option. *Bucklew* v. *Precythe*, 883 F.3d 1087, 1094 (8th Cir. 2018). But Bucklew was also careful to preserve his ability to argue against the use of gas, should it ever somehow become available.[1] On one hand, Bucklew argued that the State could not affirmatively *disprove* the viability of lethal gas at summary judgment—while on the other hand, he ensured that his own expert did not actually endorse lethal gas as an alternative method. *Id.* at 1094–95. If lethal gas ever does become available, Bucklew will assuredly point to his own expert's testimony to argue that lethal gas is unconstitutional as applied to him.

9. The district court and the court of appeals saw through Bucklew's strategy and held that, even after "extensive discovery," he had not made any real effort to discern what procedures would actually be used at his execution—and thus could not show that any such procedures would be more painful than his "lethal gas" alternative. 883 F.3d at 1096 ("Bucklew simply asserts that, in comparing execution by lethal injection and by lethal gas, we must accept his speculation that defendants will employ these risk-increasing procedures."). As the Eighth Circuit noted,

---

[1] Of course, even if Bucklew had conceded the constitutionality of lethal gas, it is unlikely that such a concession would ever have any practical effect on him given that Missouri has not used gas for executions since 1965, and its only gas chamber sits in a museum. *Ibid*; App. at 487.

Bucklew successfully prolonged his as-applied challenge in 2015 by arguing for the necessity of further fact-finding—and then showed no interest in that fact-finding once his challenge was revived. *Id.* at 1095.

Specifically, three years before, Bucklew argued that the Eighth Circuit should reverse the dismissal of his complaint to allow him to take further discovery regarding what changes the State could make to its protocol to accommodate his condition—because without knowing the exact parameters of the protocol, Bucklew could not effectively argue against them. *Id.* at 1095. But once Bucklew secured reversal and remand, he stopped caring about what changes Missouri would make to its procedures, and did nothing to determine what, exactly, the effects of those procedures would be with respect to his condition. *Id.* at 1096. The district court ruled for the State and the Eighth Circuit affirmed. *Id.* at 1097.

ARGUMENT

I. Decades-Long Delays In Obtaining Justice Inflict Immeasurable Harm On Victims' Families.

For more than two decades, the pain and grief suffered by Michael Sanders' family—including his two boys who watched their father die at Bucklew's hands—has been compounded by the interminable delays in executing Bucklew's sentence. Although there is no doubt that Bucklew murdered Michael Sanders—and assaulted, kidnapped, and raped Stephanie Ray—their families continue to await justice and closure. And they are not alone. Across the Nation, victims suffer immeasurable harm from

decades-long delays in executing sentences—delays that rob victims' families of even a modicum of peace and closure.

A. The Family Members Of Bucklew's Victims Continue To Be Victimized By His Dilatory And Manipulative Litigation Tactics.

The suffering of Michael Sanders' family has been relentlessly exacerbated by decades of undue delays and manipulative litigation tactics.

John Michael Sanders still remembers rushing to his father's motionless body after Bucklew shot him and abducted Stephanie. Moyers, *Penalty of Death, Part 1*, *supra*. He remembers his father struggling to speak to him before dying of his wounds. And he often replays that day in his head, blaming himself—then all of six years old—for unlocking the door when Bucklew knocked. "I thought if I hadn't unlocked the door, he wouldn't have been able to kick it open," he remarked in a 2011 news article. *Ibid.* "There could have been a different ending," he mused—one where his father's murder, Stephanie's abduction, and Bucklew's escape never happened. Sometimes, John Michael dreams that his father gets to watch him and his brother grow up, graduate high school, and begin happy lives for themselves. *Ibid.* "I dream that because I guess there's a part of me that still wants to believe that," he says. John Michael believes that Bucklew deserves the death penalty and that Bucklew's execution will grant him closure. Until then, he finds it difficult to fully move on. *Ibid.*

Zach, John Michael's younger brother, has had similar difficulties dealing with his father's brutal murder while Bucklew indefinitely prolongs this

litigation and delays the execution of his sentence. Zach—whose first memory is his father's murder—"has suffered through nights of fitful sleep, bad dreams and occasionally has awakened, crying." *Ibid.* Like John Michael, Zach believes that Bucklew's execution will help him fully come to terms with what has happened. Both brothers have expressed their willingness to attend the execution, and finally experience some closure and finality. *Ibid.*

Michael Sanders' father, Jerry, his mother Dorothy, and his sister, *amicus* Melissa Sanders—who helped raise John Michael and Zach—have also borne the pain of undue delays which have taken a great toll on their lives and denied them peace. "I'm angry about it. Yeah, you bet," Jerry Sanders told a reporter. "It's gotten to where I deal with it easier, but to see [Bucklew] go would give me peace of mind. It would put me to rest. I really think it would." Scott Moyers, *Penalty of Death, Part 4*, Southeast Missourian (March 23, 2011), *available at* https://tinyurl.com/y7asb8bw. Michael's sister Melissa agrees that Bucklew's sentence should have been carried out years ago. *Ibid.* But over 20 years after Bucklew was sentenced to death, they are still waiting for justice and closure.

B. Research Confirms What The Experience of Victims Makes Plain—Undue Delays in the Administration of Justice Harm Victims of Violent Crimes.

Not surprisingly, the academic literature confirms what the experiences of families like the Sanders makes painfully clear—long after the immediate loss and physical trauma are over, crime victims and their

loved ones continue to suffer from psychological wounds that refuse to heal. Courts frequently overlook the ways in which delayed proceedings compound that harm and exacerbate the initial injuries victims suffer.

It is well known, of course, that violent crime inflicts various immediate psychological traumas on victims and those close to them. Most obviously, Post-Traumatic Stress Disorder (PTSD) is commonly documented among the victims of violent crime. See Jim Parsons & Tiffany Bergin, *The Impact of Criminal Justice Involvement on Victims' Mental Health*, 23 J. Traum. Stress 182, 182 (2010); Dean G. Kilpatrick & Ron Acierno, *Mental Health Needs of Crime Victims: Epidemiology and Outcomes*, 16 J. Traum. Stress 119, 119 (2003). PTSD can afflict not only the direct victims of violent crime, but also those who experience its profound repercussions more indirectly, such as family members and friends. Kilpatrick & Acierno, *Mental Health Needs of Crime Victims: Epidemiology and Outcomes*, 16 J. Traum. Stress at 125–27 (2003).

PTSD is far from the only wound that violent crime can inflict on victims. Depression, substance abuse, panic disorder, agoraphobia, social phobia, obsessive-compulsive disorder, and suicide also number among them. Parsons & Bergin, *The Impact of Criminal Justice Involvement on Victims' Mental Health*, 23 J. Traum. Stress at 182. All of these injuries are compounded when the adjudicative process is subject to dilatory maneuvering and gamesmanship.

Of course, from the victim's perspective, proceedings rarely move quickly enough—"trial is typically delayed through scheduling conflicts,

continuances, and other unexpected delays throughout the course of the trial." Mary Beth Ricke, *Victims' Right to a Speedy Trial: Shortcomings, Improvements, and Alternatives to Legislative Protection*, 41 Wash. U. J. L. & Pol'y 181, 183 (2013). "Victims of the crimes are already heightened emotionally with anxiety and anticipation of the impending trial, and these delays lead to further and unnecessary trauma." *Ibid.* It thus is not surprising that "multiple studies" demonstrate "the negative effect on a victim's healing process when there is a prolonged trial of the alleged attacker because the actual judicial process is a burden on the victim." *Id.* at 193; Ulrich Orth & Andreas Maercker, *Do Trials of Perpetrators Retraumatize Victims?*, 19 J. Interpersonal Violence 212, 215 (2004). "The years of delay exact an enormous physical, emotional, and financial toll" on victims. Dan S. Levey, *Balancing the Scales of Justice*, 89 Judicature 289, 291 (2006); see also Samuel R. Gross & Daniel J. Matheson, *What They Say at the End: Capital Victims' Families and the Press*, 88 Cornell L. Rev. 486, 492 (2003) ("Ending this painful process can become a major goal for the victim's family-- sometimes the only realizable goal of the execution.").

Abundant academic literature thus confirms what common sense and experience make plain. A victim's experience with the criminal justice system—particularly when the process is long-delayed, convoluted, and seemingly never-ending—compounds the initial effects of violent crime. See Ricke, *Victims' Right*, 41 Wash. U. J. L. & Pol'y at 182-183; see also Judith Lewis Herman, *The Mental Health of Crime Victims: Impact of Legal Intervention*, 16 J. Traum. Stress 159, 159 (2003). A victim's experience with the criminal justice system often "means the difference

between a healing experience and one that exacerbates the initial trauma." Parsons & Bergin, *The Impact of Criminal Justice Involvement on Victims' Mental Health*, 23 J. Traum. Stress at 182.

The harm caused by drawn-out criminal justice proceedings is especially acute in cases involving capital punishment, such as this one, which often involve decades of delay and false stops and starts before the case is finally over. Delay in death penalty cases means that "[c]hildren who were infants when their loved ones were murdered are now, as adults, still dealing with the complexities of the criminal justice system." Levey, *Balancing the Scales of Justice*, 89 Judicature at 290.

"The automatic appeals, and often repeated appeals," in death penalty cases "are continually brutal on victim family members." *Ibid.* "Year after year, survivors summon the strength to go to court, schedule time off work, and relive the murder of their loved ones over and over again . . . . The years of delay exact an enormous physical, emotional, and financial toll." *Id.* at 290–91. The delays also keep family members from experiencing a sense of "closure"—the "hope that they will be able to put the murder behind them." Gross & Matheson, *What They Say at the End*, 88 Cornell L. Rev. at 489, 490-94.

II. Bucklew's Manipulative And Dilatory Suit—Based On A Claim He Refused To Bring For Years—Exemplifies The Toll Exacted On Victims Of Violent Crime As They Wait For Justice And Closure.

The Eighth Circuit properly put an end to Bucklew's decades-long abusive litigation, strategic posturing, and dilatory tactics—and its judgment

should be affirmed. For as long as this Court has recognized § 1983 method-of-execution claims, it has also recognized the potential for their abuse. See, e.g., *Gomez* v. *U.S. Dist. Court for N. Dist. of California*, 503 U.S. 653, 654 (1992) (per curiam) (rejecting method-of-execution challenge and explaining that "[e]quity must take into consideration the State's strong interest in proceeding with its judgment and Harris' obvious attempt at manipulation."). And this Court has held that "[b]oth the State and the victims of crime have an important interest in the timely enforcement of a sentence" that should be protected by dismissing abusive § 1983 suits. *Hill* v. *McDonough*, 547 U.S. 573, 584 (2006) (citing *Gomez*).

In *Hill*, this Court held that capital defendants could sometimes step outside the habeas framework and use § 1983 to challenge the method of their planned execution. *Id.* at 583. At the same time, the Court recognized the obvious potential for abuse in using § 1983 as a procedural vehicle given that, among other things, such suits are not subject to the bar on successive habeas petitions—and warned that repetitive, dilatory, and strategic § 1983 suits should not be allowed to trump the interest of victims. *Id.* at 584. The Court explained that its decisions upholding § 1983 method-of-execution suits "do not diminish that interest, nor do they deprive federal courts of the means to protect it." *Ibid.* This is so, in part, because "the 'last-minute nature of an application' or an applicant's 'attempt at manipulation' of the judicial process may be grounds for denial of a stay" or other relief. *Ibid.* (quoting *Gomez*, 503 U.S. at 654).

Although *Hill* was most directly concerned with stay applications, it approvingly cited cases that applied the same reasoning to dismiss outright

"[r]epetitive or piecemeal" § 1983 claims. *Id.* at 584–85 (noting courts' use of their equitable authority "to dismiss suits they saw as speculative or filed too late in the day" as an example of how "dilatory or speculative suits" could be addressed); *id.* at 584 (citing *White* v. *Johnson*, 429 F.3d 572, 574 (5th Cir. 2005), which dismissed a § 1983 action because the claimant "has been on death row for more than six years, and only now, with his execution imminent, has decided to challenge a procedure for lethal injection that the State has been using for his entire stay on death row").

It is difficult to imagine a more appropriate case for exercising equitable authority to protect crime victims against repeated manipulation of the judicial process than this one. Bucklew refused to make his as-applied challenge until the last moment—a mere 12 days before his execution—despite his awareness of the availability of such a challenge *at least* 6 years earlier. See *White*, 429 F.3d at 574 (dismissing § 1983 method-of-execution challenge where the claimant was aware of its availability "for more than six years" and only brought it "with his execution imminent"). Despite virtually unlimited opportunities to bring (and have resolved) any as-applied claims during that six-year period, Bucklew chose not to do so. Even after he was finally forced to bring his claim, he has been careful to avoid any real merits determination—arguing that a lethal gas procedure Missouri has not used for 50 years could *possibly* be constitutional, while offering the testimony of an expert who claims that no procedure whatsoever, gas or otherwise, could be satisfactory.

Unless the judgment below is affirmed, Bucklew will continue to bring suit after suit for no purpose

other than drawing out these proceedings and dragging his victims through as many years of litigation as he possibly can. The "important interest" of crime victims that this Court recognized in *Hill* should be vindicated here by holding that the equities lie with the victims who have been denied peace and closure for over two decades—and affirming the judgment below on that ground.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted.

PAUL G. CASSELL
S. J. QUINNEY COLLEGE OF LAW AT THE UNIVERSITY OF UTAH
383 South University Street
Salt Lake City, Utah 84112

ALLYSON N. HO
Counsel of Record
GIBSON, DUNN & CRUTCHER LLP
2100 McKinney Avenue
Dallas, Texas 75201
(214) 698-3233
AHO@GIBSONDUNN.COM

DANIEL NOWICKI
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, California 90071

DANIEL CHEN
GIBSON, DUNN & CRUTCHER LLP
555 Mission Street, Suite 3000
San Francisco, California 94105

Counsel for Amici Curiae

August 22, 2018